

FOISA Guidance

Section 41: Communications with Her Majesty etc. and honours

Exemption Briefing



Scottish Information
Commissioner

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Glossary and abbreviations

| Term used | Explanation |
|----------------------------|--|
| The Commissioner | The Scottish Information Commissioner |
| FOISA | Freedom of Information (Scotland) Act 2002 |
| FOIA | Freedom of Information Act 2000 |
| Her Majesty | The reigning monarch. The term currently refers to the Queen, but will apply to the Queen's successor, whether male or female. |
| The Sovereign | |
| The Royal Family | Any person who has held the title of HRH during the period covered by the exemption. Applies to communications with those who were members of the Royal Family for a limited period of time, but only while they were members. |
| The Royal Household | Members of the Royal Family's staff authorised to act on behalf of a member of the Royal Family in fulfilling public, official and constitutional roles. It does not apply to contractors supplying goods or services to the Royal Family. |
| SIC | The Scottish Information Commissioner, staff of SIC (depends on context) |

Cross-referenced VC documents (for internal use

| VC No | VC name |
|--------------|---|
| VC73710 | C2 FOISA Guidance The Public Interest Test in FOISA |

The exemption

The exemption: the main points

1. Information will be exempt from disclosure under section 41 of the Freedom of Information (Scotland) Act 2002 (FOISA) if it relates to:
 - (i) communications with the Queen, with other members of the Royal Family or with the Royal Household (section 41(a)); or
 - (ii) the awarding of honours by the Queen (section 41(b)).
2. The section 41 exemptions are sometimes referred to as “class-based” exemptions. This means that an exemption will apply if the information falls within a particular class of information (e.g. communications with the Queen). Unlike most other exemptions, an authority does not have to demonstrate that disclosure would cause harm before applying one of the section 41 exemptions.
3. The exemptions in section 41 are both subject to the public interest test in FOISA. This means that, even if an exemption applies, the information must be disclosed unless the public interest in withholding it outweighs the public interest in disclosing the information.
4. The exemptions in section 41 don't last forever. Generally, the exemption in section 41(a) can't be applied:
 - (i) 20 years after the creation of the information; or
 - (ii) 5 years after the death of
 - (a) the Queen (in relation to communications with the Queen)
 - (b) any other member of the Royal Family (in relation to communications with that member)
 - (c) the Sovereign reigning when the information was created (in relation to communications with the Royal Household)

whichever is the later.
5. The exemption in section 41(b) generally can't be applied to information which is more than 60 years old. The 60-year period recognises that, traditionally, the honours system is a process carried out in secret.
6. With both of the exemptions in section 41, a public authority can refuse to confirm or deny whether it holds information, provided the authority is satisfied that revealing whether the information exists or is held would be contrary to the public interest (section 18 of FOISA).
7. When the First Minister disagrees with a decision from the Commissioner given to the Scottish Administration concerning the exemption in section 41(b) (but not section 41(a)), the First Minister can overrule the Commissioner's decision, provided the information is of exceptional sensitivity and provided the First Minister has consulted with other members of the Scottish Government (section 52 of FOISA). This has never been done.

Steps in applying the exemption

8. The steps an authority must take once it has located and retrieved requested information held are:
 - (i) Decide, does the exemption apply?
 - (ii) If the exemption does NOT apply, the information cannot be withheld under the exemption.
 - (iii) If the exemption DOES apply, the public interest test must be applied.
 - (iv) If the public interest in disclosure outweighs that of withholding the information, the exemption does not apply and the information cannot be withheld under the exemption.
 - (v) If the public interest in withholding outweighs that in disclosing the information, it can be withheld and notice served to that effect.

Section 41(a) – communications with the Queen, etc.

9. Section 41(a) of FOISA allows public authorities to refuse to disclose information if it relates to communications with the Queen, the Royal Family or the Royal Household.
10. The *current* list of members of the Royal Family can be found on the official website of the British Monarchy (see **Resources** section below).

Does the information *relate to* communications with the Queen, etc?

11. The exemption applies to information which records direct communications with the Queen, the Royal Family or the Royal Household, and information *relating to* those communications. For example, a letter sent from Prince Charles to the Chief Executive of a Scottish public authority discussing an upcoming visit will be covered by the exemption, as will an internal e-mail sent from the Chief Executive updating colleagues on the content of the letter, and indicating what type of response will be issued.
12. Information relating to communications could include drafts of letters, whether or not they are finalised or sent.

Where does the public interest lie in relation to the information?

13. Where the section 41(a) exemption is found to apply, the authority must go on to consider the public interest in relation to the information. This public interest test assesses whether, in all the circumstances of the case, the public interest is best served by disclosing or withholding the information. This involves a balancing exercise. There is an in-built presumption in FOISA that it is in the public interest to disclose information unless a public authority can show why there is a greater public interest in withholding the information.
14. FOISA does not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” It has also been said that the public interest does not mean what is of interest **to** the public, but what is in the interest **of** the public.
15. The Commissioner has produced separate guidance to assist with the consideration of the public interest test. This is available from the Commissioner’s website (see **Resources** section below).

16. The Commissioner has issued a number of decisions which consider the exemption in section 41(a). See the examples in **Resources – Appendix 1**.

Consulting with the Royal Household

17. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the Environmental Information (Scotland) Regulations 2002 (often known as "the Section 60 Code") recognises that, depending on the facts and circumstances of a case, it may be appropriate to consult third parties.
18. According to the Section 60 Code (paragraphs 7.5.3 to 7.5.5), the Royal Household is the appropriate third party for an authority to consult about requests for, or relating to, royal information. See **Resources** section below for a link to the Section 60 Code.

Section 41(b) - honours

19. Section 41(b) allows public authorities to refuse to disclose information if it relates to the award of honours by the Queen.

Which honours are covered?

20. There is a wide range of honours which may be covered by this exemption. These include:
- (i) The various Orders of Knighthood
 - (ii) Military medals and decorations
 - (iii) Gallantry awards
 - (iv) Creation of life peers
 - (v) Creation of hereditary titles
 - (vi) Appointments to the Privy Council.
21. Information that might be covered by this exemption includes documents naming individuals to be considered for nomination for an honour, discussing the merits and achievements of those who might be nominated for an honour, and setting out reasons why specific individuals were, or were not, ultimately nominated to receive an honour.
22. The Commissioner has issued a number of decisions which consider the exemption in section 41(b). See some examples in **Resources – Appendix 1**.

Where does the public interest lie in relation to the information?

23. As with the exemption in section 41(a), where the section 41(b) exemption is found to apply, the authority must go on to consider the public interest in relation to the information. (See paragraphs 13 to 15 above.)
24. The Commissioner has acknowledged that there is a significant public interest in preserving the integrity of the process by which people are nominated for honours, allowing deliberations based on full information and fully expressed views. However, each case must be considered and the competing public interests in disclosure and in enabling understanding of the reasons for awards must also be taken into consideration. See **Resources – Appendix 1**.

25. The passage of time has proved to be a significant factor in some of the cases considered to date. The public interest will change over time, so it should not be assumed that the public interest will favour withholding information for the entire 60 year period during which the exemption in section 41(b) can be applied. See **Resources – Appendix 1**.

Communications with the Queen or her heir: differences within the UK

26. It's worth noting that the "Royal communications" exemption is treated differently in the rest of the UK than in Scotland.
27. As noted above, the exemption in section 41(a) of FOISA is subject to the public interest test. In 2011, the equivalent exemption in section 37(1) of the Freedom of Information Act 2000 (FOIA) was amended to make the exemption absolute in relation to communications with the Queen or her heir.
28. Theoretically, this means that information held by a Scottish public authority may be disclosed under FOISA, but the same information held by a UK public authority may be absolutely exempt from disclosure under FOIA.
29. See **Resources – Appendix 1** for a link to the (UK) Information Commissioner's guidance on section 37 of FOIA.

Appendices

Appendix 1: Resources

SIC Decisions

| Reference | Decision number | Parties | Summary |
|-------------------------------|-----------------|---|---|
| Section 41(a) Paragraph 16 | 051/2006 | Peter MacMahon and the Scottish Ministers | Mr MacMahon asked about the attitude of the Royal Family and Royal Household to the Holyrood Project. The Commissioner concluded that, in this case, the public interest in protecting personal communications outweighed the public interest in disclosing them. |
| Section 41(a) Paragraph 16 | 105/2007 | Paul Hutcheon and the Scottish Ministers | Mr Hutcheon asked the Ministers for minutes of their management group meetings. The Commissioner ordered the Ministers to disclose the information. The Commissioner did not agree that disclosing the information in question would harm the political neutrality of the monarchy and decided that the public interest in transparency in government, outweighed the public interest in withholding the information. |
| Section 41(a) Paragraph 16 | 130/2009 | David Rule and the Scottish Ministers | Mr Rule asked for communications between the First Minister's Office and Visit Scotland relating to communications with the Queen or another member of the Royal Family. The Commissioner found there was little public interest in disclosing the communications, and recognised the importance of maintaining relations between the Royal Household and the Government. |
| Section 41(a) Paragraph 16 | 150/2013 | James Hunter and the Scottish Ministers | Mr Hunter asked the Ministers for correspondence between them and the Prince of Wales on the Constitution of the UK. The Commissioner concluded that the Ministers were entitled neither to confirm nor deny whether they held any information falling within the scope of Mr Hunter's request. |

| Reference | Decision number | Parties | Summary |
|-------------------------------|-----------------|---|--|
| Section 41(b) Paragraph 22 | 221/2007 | Alistair Gemmell and the Scottish Ministers | Mr Gemmell asked for the names of the people who had recommended that Paddy Tomkins, former HM Chief Inspector of Constabulary for Scotland, receive a Queen's Police Medal. The Commissioner found that the information was covered by the exemption in section 41(b) and that the public interest lay in withholding the information; the request related to a recent award to a person who still held a high-ranking role. Those involved in the deliberations concerning the award were likely to still be in post and involved in similar future deliberations. |
| Section 41(b) Paragraph 22 | 079/2007 | Kathleen Nutt and the Keeper of the Records of Scotland | Ms Nutt asked the Keeper for a file which contained deliberations as to whether the late Jock Stein should be nominated to receive an honour. The Commissioner was satisfied that the exemption in section 41(b) applied. However, the Commissioner concluded that the public interest favoured disclosing the information: the documents were created around 40 years earlier; Jock Stein had died in 1985 and the individuals involved in discussions about the award almost certainly no longer had such a role. The Commissioner also commented that the status of the individual being considered for an award was relevant when considering where the public interest lay; Jock Stein had been a well-known public figure and remained a figure of interest. |

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014).

If you don't have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other resources

| Paragraph | Resource | Link |
|--------------|--|---|
| Paragraph 10 | The official website of the British Monarchy | http://www.royal.gov.uk/ |
| Paragraph 15 | Public interest guidance | The Public Interest Test - FOISA |
| Paragraph 18 | Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs | http://www.gov.scot/Resource/0051/00510851.pdf |
| Paragraph 29 | ICO guidance on section 37 of the Freedom of Information Act 2000 | https://ico.org.uk/media/for-organisations/documents/1194/communications_with_her_majesty_and_the_awarding_of_honours.pdf |

Appendix 2: Section 41

Communications with Her Majesty etc. and honours

Information is exempt information if it relates to –

- (a) communications with her Majesty, with other members of the Royal Family or with the Royal Household; or
- (b) the exercise by Her Majesty of Her prerogative of honour.

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Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info